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SUPREME COURT, U.S.

80-6758

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM 1981

BRIAN MILLER,

PETITIONER,

- against -

THE PEOPLE OF THE STATE OF NEW YORK,

RESPONDENT.

BRIAN MILLER
#79B875 D-5/42
135 STATE STREET
AUBURN, NEW YORK
13021

PRO SE ACTION

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STATE OF NEW YORK)
S.S.:
COUNTY OF CAYUGA)

AFFIDAVIT FOR LEAVE TO PROCEED IN FORMA PAUPERIS

BRIAN MILLER, the petitioner, first being duly sworn, deposes and says:

1. That he is the petitioner in the annexed petition for a Writ of Certiorari, pursuant to the appliable provision of this Court's Rules of procedure.

2. That with the permission of this Court, the petitioner would pray to proceed IN FORMA PAUPERIS within the meaning of TITLE 28 U.S.C. 1915.

3. That he, petitioner, is a poor person, within the meaning of TITLE 28 U.S.C. 1915, without the necessary funds from family or friends, to pre-pay the cost of the filing of this petition for a Writ of Certiorari, and that as a poor person, the petitioner seeks the possession of this Court to be allowed to proceed IN FORMA PAUPERIS.

W H E R E F O R E, the petitioner prays, that as a poor person he be allowed to proceed before this Court IN FORMA PAUPERIS without first being required to pre-pay the cost thereof.

Respectfully submitted,

s/ Brian Miller

Brian Miller
#79B875 D-5/42
135 State Street
Auburn, New York
13021

Sworn to before me
this 14th day of April, 1981.

s/ John D Cowen

Notary Public
JOHN D. COWEN NO. 15[illegible]
NOTARY PUBLIC, STATE OF NEW YORK
RESIDING IN CAYUGA COUNTY
MY COMMISSION EXPIRES MARCH 30, 19[illegible]

NO. 81-

IN THE

SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM 1981

BRIAN MILLER,

PETITIONER,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

RESPONDENT.

PROCEEDINGS

The proceeding sought to be reviewed by this petition for Writ of Certiorari, commenced in the Supreme Court of Erie County, State of New York, by the filing of an indictment (Ind. No. 43-781).

The petitioner is the only party to this proceeding.

There was no opinion rendered in the Appellate process of this criminal action. The only written opinion for review before this Court was rendered in the trial Court, and is annexed as exhibit (a). The affirmance order of the Appellate Division Fourth Judicial Department of the State of New York, stated that "...judgment so appealed from be and the same hereby is unanimously affirmed (see People v. Graham, 76 A.D.2d 228)." The Court of Appeals of the State of New York gave no written opinion. Therefore, the basis for this petition is upon the written Memorandum orders of the trial court in this matter.

PRELIMINARY STATEMENT

This petition is based upon an appeal from a judgment of conviction of the Supreme Court, Erie County, State of New York, before the Honorable Leon N. Armer, Justice, entered on the 23rd day of May,1979, upon a plea of guilty.

The petitioner, Brian Miller, upon the indictment of the Erie County Grang Jury was charged with one count of ARSON in the SECOND DEGREE (P.L. §150.15) and four counts of MURDER in the SECOND DEGREE (P.L. §125.25 (1) and (2)).*

Proceeding a HUNTLEY hearing to suppress written statements, on April 23,1979, the petitioner withdrew his previously entered plea of not guilty to the indictment and entered a plea of guilty to the reduced charges of ARSON in the THIRD DEGREE (P.L. §150.10) under count one, and MANSLAUGHTER in the SECOND DEGREE (P.L. §125.15) under the third count of the indictment. The Trial court characterized the plea exceptance as an "ALFORD PLEA."

Timely notice of appeal was filed from the State judgment of conviction.

The appeal was heard upon typewritten briefs filed in the Appellate Division Fourth Judicial Department of the Supreme Court, State of New York, upon said judgment of conviction

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(*) P.L. is reference to New York State Penal Law.

entered on April 23,1979, being unanimously affirmed on the 16th day of January,1981, upon the constrains of People v. Graham, 76 A.D.2d 228, ___N.Y.S.2d ___(1980).

Leave to appeal to the Court of Appeals was made on the 11th day of February,1981, and said leave was denied on the 23rd day of March,1981, by Associate Judge Matthew J. Jasen of the Court of Appeals, State of New York. On March 27,1981, the petitioner received through assigned counsel of the Legal Aid Bureau of Buffalo, that said leave to appeal was denied.

JURISDICTION

The judgment of affirmance entered on the 16th day of January,1981, in the Appellate Division Fourth Judicial Department of the State of New York, timely application for certificate for leave to appeal to the Court of Appeals having been denied on the 23rd day of March,1981, and received by the petitioner from assigned counsel on the 27th day of March,1981, the petition for Writ of Certiorari being filed within the sixty (60) day period of Rule 22 of the Rules of this Court, this Court has jurisdiction pursuant to §1257(3) of Title 28 of the United States Code to hear this petition.

CONSTITUTIONAL PROVISIONS

This case involves the Fourth Amendment's right to be free from illegal search and seizure; the Sixth Amendment right to counsel; and the Fourteenth Amendment's right to Due Process of Law, all within the meaning of the United States Constitution.

QUESTIONS PRESENTED

POINT I ..... THE ARREST OF THE PETITIONER WAS NOT BASED UPON PROBABLE CAUSE, ACCORDINGLY, ALL STATEMENTS EXTRACTED FROM THE PETITIONER CONSTITUTED FRUITS OF AN ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED;

POINT II ..... THE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL DURING THE INTERROGATIONS INVOLVING THE TWO STATEMENTS WAS VIOLATED, ACCORDINGLY, BOTH STATEMENTS SHOULD HAVE BEEN SUPPRESSED;

POINT III ..... THAT THE TAKING OF THE SECOND STATEMENT WAS ILLEGAL, IN THAT THERE WAS NOT A SUFFICIENT BREAK BETWEEN THE SECOND STATEMENT TO DISSIPATE THE TAINT OF THE FIRST STATEMENT, ACCORDINGLY, THE SECOND STATEMENT SHOULD HAVE BEEN SUPPRESSED.

STATEMENT OF FACTS

BRIAN MILLER, the petitioner, was arrested on December 23rd, 1977, and held in custody in connection with a fire which occurred at 277 Fillmore Street in the City of Buffalo, State of New York. During that fire, which occurred on November 12,1977, two people died.

JEROME McINTEE, a Buffalo Police Officer assigned to the District Attorney's office as an investigator, arrested the petitioner at his home on December 23,1977 (H.M. pp. 77-79).*

When Investigator McIntee went to arrest the petitioner, proportedly, armed with information consisting of two (2) signed statements and a third verbal statement that the petitioner was at the scene of the fire (H.M. pp. 53-54), the Investigator McIntee did not have an arrest warrant (H.M. p.110), or for that matter neither did he have a search warrant. The Investigator knocked at the door of 223 Paderewski Drive, Buffalo, New York, the house of the petitioner, and asked whether Brian Miller, the petitioner, was there. The reply was "no". The Investigator then entered the house of the petitioner, without a search, or arrest warrant, and without the consent of any of the occupants therein. He then proceeded to search through the house (H.M. p. 133) and arrested the petitioner in the living room (H.M. pp. 107, 133-34). The hearing minutes reveal that the pretext for entering the house was a complaint of loud noise (H.M. pp. 111, 132-33).

(*) H.M. reference to pages of suppression hearing transcripts.

According to Investigator McIntee, the petitioner had been a suspect since the day of the fire, some six weeks earlier to his arrest (H.M. p. 108). Upon arresting the petitioner and walking him out the back door of the house, Investigator McIntee advised him of his rights (H.M. p. 79). As far as Investigator McIntee could recall, the petitioner was not asked if he was willing to talk to him, or Fire Investigator Francis Haynes until they reached Police headquarters (H.M. pp. 81, 90).

Investigator McIntee and Fire Investigator Haynes while driving the petitioner to the Police headquarters, told petitioner that they had statements from two people to whom petitioner is alleged to have admitted setting the fire, and that whether petitioner wanted to talk about it, to which the petitioner responded no (H.M. pp. 38-39).

At Police headquarters, petitioner was taken to an interview room. Therein Investigator Joseph Marciniak read him the Miranda rights twice. Investigator McIntee then had petitioner read the two statements that had been mentioned in the car in route to the police headquarters (H.M. pp. 81, 83). According to Investigator Marciniak, the Miranda warnings were given after the two statements had been shown to the petitioner (H.M. p. 125).

Through continuous interrogation of the petitioner, the record of the suppression hearing reflects that the petitioner had given statements. The first statement was taken by Investigator McIntee and Fire Investigator Haynes. The second statement was taken by Investigator Detective Stanley W. Suszek and Sergeant Dove.

Investigator McIntee after hearing the first verbal statement of the petitioner, asked that he repect it, so that it could be tape recorded. At the end of the tape recording, Investigator McIntee gave the petitioner a "note" stating that he the petitioner had cooperated with the authorities in the investigation, and verbally assured the petitioner that he would try to help petitioner in the future, if, he could (H.M. pp. 84-85).

According to the arrest record, the time of petitioner's arrest was 6 P.M. (H.M. p 97). Petitioner was officially booked approximately an hour after he had been picked up, and after questioning by Investigator McIntee (H.M. p. 49).

Police officer Stanley Suazek of the Buffalo Police Department was one of the officers who was present when the petitioner was arrested at his home (H.M. p. 3). Officer Suszek, sometime around 7:30 P.M., after the first statement was taken from petitioner by Investigator McIntee, took the petitioner from the cell block to the Homicide Bureau, read the petitioner the Miranda rights and proceeded to interrogate him (H.M. p. 6). Sometime thereafter, a second statement was taken and reduced to writing. Petitioner was asked to sign the statement, but refused to do so without an attorney (H.M. p. 13).

Wayne Miller, petitioner's brother testified that he was at 223 Paderewski Drive, the home of the petitioner, on December 23, 1977. That about 6 P.M., there was a knock at the door, that he asked who was there, and the reply was "Police". That the speaker indicated that they were there on a complaint

of loud music, and that when the police entered the house, they first grabbed him, then Michael Brzozowski, asking whether they were Brian Miller, the petitioner (H.M. pp. 132-133). Mr. Miller, brother of the petitioner, further stated that one of the officers went through each room and eventually came out with petitioner (H.M. pp. 133-135).

Brian Miller, the petitioner, testified in his own behalf, that after the police knocked on the door, he was on his way towards another room to put on another record. That Investigator McIntee came up to him and asked if he was Brain Miller. When he replied that he was, Investigator McIntee told him that he had to go with him (H.M. p. 142). That he was advised of his rights outside of his house (H.M. pp. 143-144) and possibly during the trip to police headquarters (H.M. p.145). That he refused to talk to the Investigator and another officer in the car, and that he refused to sign the waiver card when he was questioned, and that twice he told Investigator McIntee he wanted an attorney (H.M. pp. 146-147).

The petitioner was not given the opportunity to call an attorney or his family (H.M. pp. 150-151).

The trial court in a Memorandum order, dated April 17,1979, held that the People had not sustained their burden of proof with respect to petitioner's first statement to Investigator McIntee and suppressed that statement accordingly. The Court in so doing, indicated that there was no satisfactory showing that petitioner knowingly and intelligently waived his right to counsel and that to some measure the waiver was the result of Investigator McIntee's menace toward and promises made to

petitioner (M.D. I. p. 2)* As to the second statement, the Court ruled that there was a sifficient break in the chain of events between the first statement to attenuate any taint which may have occurred at the time of the first statement, deeming the second statement to have been given knowingly and voluntarily (M.D. I p. 3).

Based upon a Memorandum of law submitted by counsel for petitioner, a further memorandum order was issued, dated April 23,1979, which the Court upon reconsideration of its previous memorandum dated April 17,1979, found that "...there was such definite pronounced break between the interrpgations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning." (M.D. II. p. 1).

The Trial Court, also, found that upon the record, that while no arrest warrant had been issued, the officers did have the right to make the arrest pursuant to Criminal Procedure Law §140.10(1)(b); §140.15(4). That the officers had the right to make inquiry of the petitioner concerning the matter pursuant to Criminal Procedure Law §140.20(4), and that immediate arraignment could not be had pursuant to Criminal Procedure Law §140.20(1). The Trial Court also found that the petitioner was not subject to illegal detention, and that he did not desire to speak to an attorney (M,D. II. pp. 1-2).

(*) M.D. I. represents Memorandum Decision I dated April 17,1979.

POINT I

THE ARREST OF THE PETITIONER WAS NOT BASED UPON PROBABLE CAUSE, ACCORDINGLY, ALL STATEMENTS EXTRACTED FROM THE PETITIONER CONSTITUTED FRUITS OF AN ILLEGAL ARREST AND SHOULD HAVE BEEN SUPPRESSED

The FOURTH AMENDMENT to the United States Constitution reads:

> "The right of the People to be secure in their persons...against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The petitioner contends that his arrest, without a warrant, in his residence, was illegal and without the necessary prerequisite of probable cause to justify a warrantless arrest, as a matter of Federal constitutional law.

The petitioner's arresting officer Investigator McIntee, asserted during the suppression hearing that the basis for the arrest was upon the three statements of three individuals which contained hearsay admissions by the petitioner, that he had started the fire which took the lives of two individuals.

With nothing more then the fact that the petitioner was indeed at the party the night of the fire, the Police had no evidence which served to link the petitioner to the crime. These elements are in and of themselves insufficient to establish probable cause to arrest.

The standard of reasonableness as an ingredient of probable cause govern both Federal and State activities (see: Ker v. California, 374 U.S. 23 (1963); Aguilar v. Texas, 378 U.S. 108 (1964)).

Because of the exclusionary sanction, the FOURTH AMENDMENT is more commonly thought of as a limitation on the power of the Police to search for and seize evidence, instrumentalities, and fruits of crime. However, an illegal arrest or unreasonable seizure of the person is itself a violation of the Fourth and Fourteenth Amendments (see: Terry v. Ohio, 392 U.S. 1 (1968); Henry v. United States, 361 U.S. 98 (1959)).

Initially, it must be pointed out that the existence of probable cause is the sine qua non of any arrest, with or without a warrant. It is the entry into the home for the purpose of arrest that requires, in addition to probable cause absent exigent circumstances, a warrant or consent (cf., Payton v. New York, U.S. ,100 S.Ct. 1371 (1980).

In this case, Investigator McIntee, entered the petitioner's house under the pretext that there was a loud party going on. Investigator McIntee, when asked about the ruse of a loud party, stated the following:

> "Q. Isn't it also a fact, Sir, that at the time you approached the house you notified the occupants that you'd received a complaint of a loud party in there ?
>
> A. I don't recall.
>
> Q. Could it be ?

A. Might have been, I don't know.

Q. Was this a ruse you used to get inside the house ?

A. Might have been, I don't know. I don't recall it, I told you counsel.

Q. As a matter of fact, nobody came and opened the door for you, did they ?

A. No, the door was open.

Q. You just went in, right ?

A. No. Somebody answered the door. We asked if Brian Miller was there, and he said, "No." And then we went in.

Q. No one said come on in, did they ?

A. I don't believe so, no, sir." (H.M. p.111).

An overall reading of the suppression hearing transcripts of this case, clearly, reflect that the totality of the circumstances did not warrant entry into petitioner's home, since (1) the police did not have probable cause; and, (2) there were no exigent circumstances to justify such entry for purposes of arrest of the petitioner.

This Court in Fourth Amendment cases has seemingly approached its review of a given case by a review of the totality of the circumstances, and that that review has taken place in the context of some definitive thoughts on what may constitute a compelling need for official action (e.g., danger to human life or property, the escape of the suspect, and the destruction of evidence).

A clear question of constitutional law is reflected in this case: DO THE FACTS REVEAL A COMPELLING NEED FOR OFFICIAL ACTION AND NO TIME TO SECURE A WARRANT FOR ARREST ? (cf., e.g.,

Michigan v. Tyler, 436 U.S. 499, 509 (1978)).

The arresting officer in this case, when asked whether he or any other officer made an application for a warrant of arrest of the petitioner, he stated "No" (H.M. p. 110), and when asked why, he stated, "It wasn't necessary" (H.M. p.110). It is important to note that the officers did not state their true purpose prior to the entry into petitioner's home. Instead, they relied upon a subterfuge - a complaint of loud music.

Giving the benefit of the doubt, arguendo, that the police in this case had probable cause to arrest the petitioner, there was no reason why the police could not have obtained an arrest warrant. The arrest in question took place during early evening hours of a weekday when it would not have been difficult to locate a Judge to obtain one. There were no "exigent circumstances" which would have justified a warrantless arrest. First, the crime was then some six weeks old; second, there existed no physical evidence that may or could have been destroyed; and, third, the police were no pursuing an armed suspect. And furthermore, the police had no information that there was a likelihood that the petitioner would have fleed, if not swiftly apprehended.

Under New York Law, Criminal Procedure Law §140.15 subd.(4) applies to warrantless arrest situations, and substantially juxtaposes the exigent circumstances requirement setforth in C.P.L.§120.80 subd.(4) for arrest with a warrant.

The Trial Court held that "While the officer had no arrest warrant, they did have the right then and there to make

the arrest (CPL §140.10 subd.(1)(b), §140.15 subd.(4)), they then being in possession of evidence of admissions claimed made by defendant to certain citizens not police or peace officers" (M.D. I. p. 2). The basic crux of New York's C.P.L. §140.10 subd.(1)(b), that a police officer "...has reasonable cause to believe that such person has committed such crime, whether in his presence or otherwise", does not, in this case, give rise to the justification for the arrest upon a warrantless entry under the totality of the circumstances.

This Court has held:

> "(F)or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." (Payton v. New York, supra. at 1388).

But knowing when an arrest warrant can legally be obtained and when, with a warrant, officers may enter a suspect's home does not answer the questions of when in a given investigation a warrant should be sought and whether from that point, or perhaps during the period a warrant is being sought, the exigencies of the situation mandate that the police proceed without obtaining the warrant (cf., Wallace v. King, F.2d. (4th Cir. 1980)(arrest and search warrant); United States v. Arboleda, F.2d (2nd Cir. 1980)(arrest warrant)).

The record clearly shows that this was a "planned arrest", or one made in the course of an on-going investigation, and the only evidence sought of a non-tangible nature was that of which came forth from the petitioner's mouth: a confession!

In this case, the officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. There were no tangible goods seized, nor in existence, which could be deemed in the process of destruction, or about to be removed from the jurisdiction (see: e.g., Vale v. Louisiana, 399 U.S. 30 (1970); Warden v. Hayden, 387 U.S. 294 (1967); United States v. Santana, 427 U.S. 38 (1976)).

In conclusion, this case reflects nothing more than the officers attempt to circumvent the warrant requirement of the Criminal Procedure Law of New York State, in having the determination of probable cause judged by a detached magistrate, rather than based upon the actions and opinion of a police officer who is engaged "...in the often competitive enterprise of ferreting out crime"(see: Johnson v. United States, 333 U.S. 10, 14 (1948)). Since the exigencies of the situation did not make the course of action taken in this case imperative (cf., McDonald v. United States, 335 U.S. 451, 456 (1948)). Exigent circumstances as an exception cannot be showing, nor be the basis for the illegal entry into the petitioner's home to effectuate an arrest.

In light of these factors, and since Payton controls the circumstances of this case, all statements obtained from the petitioner after his illegal arrest should have been suppressed.

POINT II

THE PETITIONER'S CONSTITUTIONAL RIGHT TO COUNSEL DURING THE INTERROGATIONS INVOLVING THE TWO STATEMENTS WAS VIOLATED, ACCORDINGLY, BOTH STATEMENTS SHOULD HAVE BEEN SUPPRESSED

Under the circumstances of this case, petitioner's inculpatory statements should have been suppressed because the People of the State of New York did not establish beyond a reasonable doubt that they were voluntarily given (see: Miranda v. Arizona, 384 U.S. 436 (1966); People v. Huntley, 15 N.Y.2d 72, 78 (1965)). Furthermore, the petitioner's right to counsel attached during the first interrogation, by virtue of the Trial Court's ruling that it should be suppressed as being involuntary.

Petitioner was arrested and taken into custody on December 23,1977, in connection with a fire that claimed the lives of two individuals. From the point of the arrest of petitioner at his home, to the point of arrival at the Police Headquarters, the record in this case reveals testimony of such a contradictory nature, that it borders on perjury.

First, as the record reads, the order of witnesses for the People do not constitute the order of events that took place in the arrest of the petitioner.

Firemen Francis J. Haynes of the Buffalo New York Fire Department, Engine 10 Company and Investigator Jerome McIntee of the Buffalo District Attorney's Office were the individuals that took the petitioner into custody (H.M. pp. 36-

37, 78-79).

Detective Stanley W. Suszek of the Buffalo, New York Police Department and Firemen Joseph Marciniak of the Buffalo, New York Fire Department were are the home of the petitioner when the arrest took place (H.M. pp. 4, 121-123).

HAYNES and McINTEE were involved in the first interrogation of the petitioner, which was suppressed by the Trial Court (H.M. pp. 34-76; 77-113).

SUSZEK and Sergeant DOVE were involved in the second interrogation of the petitioner, which the Trial Court allowed into evidence against the petitioner (H.M. pp. 2-34)*

During both interrogations of the petitioner, he indicated that he desired an attorney (H.M. pp. 146-147).

Clearly, such requests precluded any questioning of the petitioner until an attorney had been assigned to him (see: People v. Cunningham, 49 N.Y.2d 203 (1980); Miranda v. Arizona, supra.).

The rule in New York is that, in the case of custodial interrogation, the People must establish beyond a reasonable doubt that MIRANDA rights were given and waived voluntarily before the introduction of a defendant's confession is permitted (see: Miranda v. Arizona, supra; People v. Yarter,

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(*) Sergeant Dove did not testify for the People, nor was he called as a witness for the petitioner.

41 N.Y.2d 830 (1977); People v. Valerius, 31 N.Y.2d 51 (1972); People v. Huntley, supra.).

Where the interrogation is custodial and it is clearly established that MIRANDA rights have been recited to the defendant, the analysis then focuses on whether the defendant voluntarily, knowingly and intelligently waived his privilege against self-incrimination and his right to counsel (see: Miranda v. Arizona, supra at 479).

The due process clause dictates that involuntary confessions, i.e., confessions which are the product of a will which was overborne or not the product of rational intellect, are inadmissible in criminal trials (see: e.g., Lego v. Twomey, 404 U.S. 477 (1972; Jackson v. Denno, 378 U.S. 369 (1964); Brown v. Mississippi, 297 U.S. 278 (1936)).

New York State Criminal Procedure Law §60.45, codifies this rule by providing that a confession involuntarily made is inadmissible in a criminal case and defines an involuntary statement as that which is obtained in violation of constitutional mandates or by improper conduct or undue pressure which "undermine the ability to make a choice whether or not to make a statement." (see: N.Y. Crim. Proc. Law §60.45; cf., People v. Anderson, 42 N.Y.2d 35 (1977)).

The point at which petitioner was arrested without a warrant and taken into custody for questioning is the point at which his constitutional right to counsel attached. It should be held that he could not have waived this right except in the presence of an attorney, especially since the first interrogation and taking of a statement was so overborne, and which the Trial Court held "Nor can it be said on this

record on the question of the voluntariness of defendant's acts, that the evidence obtained is free from doubt that it was not in some measure the product of the menace toward and promises made to him implicit in the conduct and statement of Detective McIntee. (see: D.M. I. p. 2). Thus, petitioner's inculpatory statements were taken in violation of his constitutional right to counsel and should have been suppressed (see: N.Y. Const. Art. 1 §6; People v. Cunningham, supra; People v. Samuels, 49 N.Y.2d 218 (1980); People v. Rogers, 48 N.Y.2d 167 (1979)).

It is well settled law that the Federal Sixth Amendment guarantee of assistance of counsel attaches at all critical stages of a criminal prosecution (cf., United States v. Wade, 388 U.S. 218 (1967); Kirby v. Illinois, 406 U.S. 682 (1972)).

Because this State's Court of Appeals "has consistently exercised the highest degree of vigilance in safeguarding the right of the accused to have the assistance of counsel at every stage of the legal proceeding against him," a critical stage occurs much earlier in New York than in Federal jurisdiction (see: People v. Cunningham, supra at 207; People v Samuels, supra at 221).

An individual who is being interrogated while held in Police custody has a right to the assistance of counsel even though he is unrepresented and there has been no formal commencement of a criminal action. As the Court of Appeals noted in People v. Cunningham, supra, "when an unrepresented individual who is being held in police custody invokes his right to assistance of counsel...he is expressing his view that he is not

competent to deal with the authories without legal advise." (see: People v. Cunningham, supra at 209).

While the preeminence of Miranda v. Arizona, supra, may have obviated the need for the courts in New York to specifically state that the right to counsel attaches during a custodical interrogation, it has always existed. As in People v. Conyers, 49 N.Y.2d 174 (1980), the Court observed that recitation of Miranda warning to someone in custody "merely repeats and reiterates the promises already made by the Constitution." (see: People v. Conyers, supra at 180). In fact, even the failure of the police to recite the warnings "does not serve to prevent a suspect from relying on that promise." (Id., at 180). The only question remaining is whether the right to counsel under the specific facts of this case indelibly attaches.

It does not make sense to say that an unrepresented defendant in custody who has not requested an attorney can effectively waive his rights without the advise of counsel and at the same time say that a suspect who is represented even on an unrelated matter can waive his rights only in the presences of counsel (cf., People v. Cunningham, supra at 209; see, e.g., People v. Garofolo, 46 N.Y.2d 592, 600 (1979); People v. Rutigliano, 261 N.Y. 103, 107 (1933)).

Upon the record of this case, the petitioner asserts that he was entitled as a matter of constitutional law to the assistance of counsel, and that no waiver of that right ensued from the first interrogation to the second interrogation.

POINT III

THAT THE TAKING OF THE SECOND STATEMENT WAS ILLEGAL, IN THAT THERE WAS NOT A SUFFICIENT BREAK BETWEEN THE SECOND STATEMENT TO DISSIPATE THE TAINT OF THE FIRST STATEMENT, ACCORDINGLY, THE SECOND STATEMENT SHOULD HAVE BEEN SUPPRESSED

One hour after petitioner's arrest, he was booked by McIntee and taken to a cell block within the Police Headquaters. McIntee then left police headquarters after filing his reports and leaving a copy for the Homicide Squad (H.M. pp. 103, 104). Investigator McIntee, while not being sure, conceded that he probably handed a copy of his report to either Sergeant Dove or Detective Suszck, the two homicide detectives who had accompanied him during the petitioner's arrest (H.M. pp. 104, 105). Investigator McIntee believed that his report given to Dove or Suszek did indicate he had taken a statement from the petitioner (H.M. p. 104).

The record reflects that at approximately 7:30 p.m., Dove and Suszek brought the petitioner down from the cell block to their office where Suszek read petitioner his Miranda rights (H.M. p. 6).

The Trial Court suppressed the first statement taken from the petitioner by McIntee and Haynes, but as to the second statement given to Dove and Suszek, the Trial Court held:

> "The statement given to them bears no taint from the prior conduct of McIntee since it was a detached, free and rational choice of defendant, under circumstances so removed from McIntee's apparent improper acts, as to be an independant act of defendant." (M.D. I. P. 3).

In a further finding upon a motion submitted by petitioner's trial counsel for reconsideration of the ruling as to the second statement, the Trial Court held:

> "This Court thereupon finds in the event that such finding is not deemed to have been heretofore made, that there was such a definite pronounced break between the interrogations which were the subject of the hearing held that the defendant may be said to have returned, in effect, to the status of one who is not under the influence of questioning..."(Citation omitted)(M.D. II.p. 1).

At the outset, the petitioner was neither released from custody, nor had he been taken before a magistrate for arraignment, or removed from the building and influence of the police officers that participated in his arrest and first statement.

The Trial Court's holding "...that there was such a definite pronounced break between the interrogations..." is totally unsupported by the record in this case. First, the taint of the first interrogation cannot be said to have dissipated to such a degree to constitute a sufficient purging of the primary taint (see: e.g., Wong Song v. United States, 371 U.S. 471, 487-488 (1963)).

One need not argue by analogy to the search and seizure language of the "fruit of the poisonous tree" doctrine to apply it to a Miranda violation. Miranda is based on the Fifth Amendment's privilege against self-incrimation, and a body of law has developed regarding the fruits of such violations which makes it even more emphatic that the doctrine is applicable.

At best the period between the first interrogation and taking of the statement is but fifteen to thirty minutes.

This being the case, upon the facts of this case, then the second statement taken from the petitioner by Suszek and Dove cannot be deemed to have been sufficiently removed by time, or intervening events, so as to attenuate the taint of McIntee's conduct in obtaining the first statement. To be purged of the primary taint of McIntee's interrogation in the first statement, the elements of attenuation constituting sufficient breaking of the taint upon the second must be something more than a period of 15 to 30 minutes (see, e.g., Killough v. United States, 315 F.2d 241 (1962)).

Accordingly, the second statement should have been suppressed.

CONCLUSION

T H E R E F O R E, the petitioner prays that this Honorable Court grant his petition for a writ of certiorari upon the issues sotforth heretofore.

Respectfully submitted,

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Sworn To Before Me This
19th Day of May, 1981
John D Cowen

JOHN D. COWEN NO. 1915
NOTARY PUBLIC STATE OF NEW YORK
RESIDING IN CAYUGA COUNTY
MY COMMISSION EXPIRES MARCH 30, 1982

BM/rs